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No. 73-1046

In the Supreme Court of the United States

OCTOBER TERM, 1975

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

SANTIAGO DIAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE APPELLANT

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This supplemental brief is filed in order to discuss the implications of this Court's decision in *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, for both the jurisdictional and substantive aspects of this case.

I. JURISDICTION

1. The named plaintiffs in *Salfi*, a widow whose husband died within nine months of the date of their marriage, and her daughter by a previous marriage, had filed applications with the Secretary for mother's

and child's insurance benefits. The applications were denied both initially and upon reconsideration at the regional level, because the duration-of-relationship requirements of Section 216(c)(5) and (e)(2) of the Social Security Act, 42 U.S.C. 416(c)(5) and (e)(2) (marriage for nine months), had not been met. Contending that those duration-of-relationship requirements denied due process, the plaintiffs then instituted a suit for declaratory and injunctive relief and money damages on behalf of themselves and all others who had been rendered ineligible for benefits as a result of those requirements. A three-judge district court granted the requested relief, and the Secretary appealed to this Court.

The Court first considered whether the district court had jurisdiction. The Court ruled that Section 205(g) of the Act, 42 U.S.C. 405(g), provides the exclusive basis for jurisdiction over actions, such as the plaintiffs', brought to recover Social Security benefits. That Section permits review only where there has been a final decision by the Secretary made after a hearing. Although the decision denying the plaintiffs' applications for benefits had not been made after a hearing, the Court held that the district court had jurisdiction to hear plaintiffs' suit on their own behalf because (1) "a hearing [would] be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law * * *" (slip op., p. 15) and (2) the Secretary had determined that the reconsideration decision was "final" within the meaning of Section 205(g).

The Court further held, however, that the district court had lacked jurisdiction over so much of the complaint as concerned the class, for "the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought" (slip op., at p. 12).

2. In this case, appellees Diaz and Clara filed applications for Medicare Part B benefits on June 15, 1972. Their applications were initially denied by the Birmingham, Alabama, Payment Center of the Social Security Administration because they had not satisfied the eligibility requirements that must be met by aliens under 42 U.S.C. (Supp. III) 1395*o* (2)(B), *i.e.*, lawful admittance for permanent residence, and actual residence in this country for five years, and they were notified of this initial adverse determination on August 4, 1972 (A. 21-24). They did not request further administrative review. Instead, on August 18, 1972, Diaz instituted this suit for declaratory and injunctive relief as a class action, which Clara and also appellee Espinosa, an alien who had been lawfully admitted for permanent residence but had not satisfied the five-year residence requirement, joined as named party plaintiffs on September 28, 1972 (A. 1, 25). Unlike Diaz and Clara, Espinosa had not filed an application for

Medicare Part B benefits before the suit was instituted, or even before he joined the suit.[1]

a. Under *Salfi*, the district court had no jurisdiction over so much of appellees' complaint as concerned the class. Section 205(g) is the exclusive grant of jurisdiction over suits challenging the Secretary's denial of Medicare Part B benefits (see 42 U.S.C. (Supp. III) 1395ff and 1395ii), and, as we have seen, such suits may be maintained only to review final decisions by the Secretary. But here, as in *Salfi*, "the complaint * * * contains no allegations that [the members of the class] have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise * * *" (slip op., at p. 12). Indeed, no such allegations could have been made, for the class certified by the district court includes "[a]ll immigrants * * * who * * * *will be* denied enrollment * * *" (A. 50-51; emphasis added).

Thus the class by definition embraces individuals who either have not filed applications or with respect to whose applications the Secretary has rendered no final decision, *i.e.*, individuals over whose complaints, if separately filed, the district court would have lacked jurisdiction. The district court therefore similarly lacked jurisdiction over their claims when asserted on their behalf by appellees in a representative capacity.

[1] Espinosa's application for benefits was filed later, on October 26, 1972. While this appeal has been pending, the Secretary has reviewed that application, which presented a question of fact as well as one of constitutional law, and has determined that it should be denied. No action with respect to it has been taken, however, because of the district court's unstayed grant of relief, which resulted in Espinosa's enrollment in Medicare Part B in mid-1973.

b. The district court had jurisdiction over the claims of appellees Diaz and Clara. Those appellees occupy the same position as the named plaintiffs in *Salfi*: they applied for benefits, their applications were denied solely because they concededly did not satisfy specific statutory eligibility requirements, and they then brought suit to challenge the constitutionality of those requirements.

Although the denial of benefits here was merely an initial adverse determination, whereas the denial in *Salfi* was upon review at the regional level, that distinction is not significant in the circumstances of this case. The Secretary has determined that, since Diaz' and Clara's applications do not raise any disputed question of fact, further administrative review of those applications would be futile and therefore that the initial determinations are "final" for purposes of this litigation. See *Salfi*, *supra*, slip op., at p. 15.[2]

c. The district court, however, should have dismissed appellee Espinosa's claim for want of jurisdiction. Section 205(g) confers jurisdiction only to

[2] The Secretary is currently considering the promulgation of regulations that will specify the circumstances under which a decision denying benefits without a hearing will be treated as "final." It is anticipated that such regulations will furnish a basis for consistent treatment of similar cases presenting the jurisdictional question involved here. Cf. *Mazer* v. *Weinberger*, No. 74-1181, and *Kohr* v. *Weinberger*, No. 74-5538, both vacated and remanded, June 30, 1975.

review decisions of the Secretary, and at the time Espinosa was added as a party plaintiff, he had not yet even applied for benefits. There was no decision of the Secretary to review and, hence, no jurisdiction to hear Espinosa's claim.[3]

3. Accordingly, the district court properly had before it only the individual claims of Diaz and Clara. Since full and complete relief could have been granted to those two claimants by reversing the Secretary's denial of benefits, the convention of a three-judge district court and the consideration of any injunctive relief were in our view improper. But this Court need not decide that question in this case, for the judgment below, holding an Act of Congress unconstitutional, is directly reviewable by this Court under 28 U.S.C. 1252, without regard to whether the three-judge court was properly convened. See *Salfi*, *supra*, slip op., at p. 11 n. 8. Cf. *Norton* v. *Mathews*, No. 74-6212, question of jurisdiction postponed until hearing on the merits, June 30, 1975.

II. THE MERITS

Since, for the reasons noted, *supra*, Diaz and Clara are the only proper appellees, this Court may not

[3] The fact that the Secretary has now determined that Espinosa's application should be denied (see note 1, *supra*) cannot confer jurisdiction on the district court *nunc pro tunc*. Section 205(g) requires, at a minimum, some decision by the Secretary before the complaint is filed or the plaintiff added as a party to an existing suit. Espinosa may, of course, bring a separate action for review upon receipt of notification of a final denial of his application. Thus the exclusivity of the Section 205(g) review procedures will not operate to deny Espinosa judicial review of his claim.

have to decide all the issues originally presented. Assuming that Diaz and Clara are still unable to meet either the lawfully-admitted-for-permanent-residence or the continuous-five-year-residence requirement,[4] appellee Espinosa's absence may obviate the necessity for deciding whether the two requirements are severable or whether the five-year residence requirement is constitutional.

The Court will reach the severability issue only if it finds the lawfully-admitted-for-permanent-residence requirement unconstitutional, and thus that appellees' failure to meet that condition does not bar them from enrollment. Alternatively, if the Court agrees with our submission that that requirement is constitutional, that decision will dispose of appellees' claims, and the Court need not reach the question of the constitutionality of the five-year-permanent-residence requirement.

Since we cannot tell which issues are still in the case, we refer to both substantive requirements in

[4] It may be that either or both of them have now been lawfully admitted for permanent residence retroactive to their original date of entry. Diaz apparently entered this country in February 1971 and Clara in July 1971 (A. 34-35). They were thus eligible to apply for a retroactive adjustment of status in 1973, which would ordinarily have led to their receiving permanent residence status retroactive to 1971 in approximately February and July 1975, respectively (J.S. App. 19, n. 6). If either one has in fact had his status adjusted, he now presents the same issues orginally presented by Espinosa. If both have, only the five-year residence requirement is before the Court.

the following discussion.[5] Moreover, since *Salfi* is equally relevant to both, we do not discuss them separately.

This Court emphasized in *Salfi*, *supra*, slip op., at pp. 16-22, the broad discretion of the legislature in enacting social welfare legislation, reaffirming the principles established in *Flemming* v. *Nestor*, 363 U.S. 603, 611, *Dandridge* v. *Williams*, 397 U.S. 471, 485-486, and *Richardson* v. *Belcher*, 404 U.S. 78, 84. In sum, "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, * * * though of course Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group' * * *. [Appellees'] only [available] constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test" (*Salfi*, *supra*, slip op., at p. 20; citation omitted).

This claim must fail here; both the "admission for permanent residence" test and the durational residence requirement are rationally related to the legitimate legislative objective of limiting the availability of subsidized health care to those with a substantial relationship to this country.

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[5] We believe that the severability issue is adequately discussed in our original brief (pp. 30-34); *Salfi* does not significantly affect that discussion.

The limitations are consistent with the fundamental concept of the social insurance program of which they are a part. Congress chose to institute the novel program of extending federal medical care benefits to the elderly by adapting the basic scheme contained in Title II of the Social Security Act (Old Age and Survivors Benefits) to include ill health as one of the risks against which protection would be afforded; the two types of benefits are thus closely related (see main brief, pp. 23-24).

This Court has recognized that Title II benefits are based upon the principle that "persons gainfully employed, and those who employ them, are [to be] taxed [so as] to permit the payment of benefits to the retired and disabled, and their dependents." *Flemming* v. *Nestor*, 363 U.S. 603, 609. The entire system is premised upon the assumption that those now receiving benefits have contributed to the payment of past beneficiaries, and that those now employed will later receive benefits financed by the contributions of those who are then making payments to the system. See *id.* at 608-609. The principal feature of the Title II program thus lies in its contributory nature. All individuals, regardless of alienage, are eligible for Title II benefits so long as they have been employed, and have thus contributed to the system for the requisite period. 42 U.S.C. 402, 414(a)(2).

Medicare Part B also principally rests upon the same basis. Eligibility for Title II benefits, and hence for Medicare Part A, provides automatic eligibility

for Medicare Part B. 42 U.S.C. (Supp. III) 1395*o* (1). However, since Part B, unlike Part A and Title II benefits, is financed in part by premiums and in part by general revenue, 42 U.S.C. (Supp. III) 1395j, the principle is modified somewhat so that some individuals who have not contributed to the Title II or Medicare Part A trust funds are nevertheless eligible for enrollment in the program. 42 U.S.C. (Supp. III) 1395*o*.

But in view of the close relationship between Title II and Medicare Part B, it was reasonable for Congress to limit this extension of eligibility, and to conclude that individuals who have neither contributed to the trust fund nor to general tax funds during their working life should not receive subsidized health care in their old age. Moreover, in view of the administrative difficulties of making individual eligibility determinations based on lifetime contributions, Congress could rationally conclude that a general rule limiting eligibility to citizens and aliens lawfully admitted for permanent residence who have resided in this country for the five years preceding their application most effectively served its purpose (see *Salfi*, *supra*, slip op., at p. 32).

This categorization may be somewhat over-inclusive—since it permits enrollment of citizens who have lived permanently overseas, or who have lived here and never paid taxes [6]—and somewhat under-inclu-

[6] Contrary to the conclusion of the district court (J.S. App. 27-29), there are rational reasons for including indigent citizens—even those who have never worked—and not aliens who have contributed to the economy for less than 5 years. Both provisions tend to reduce the demands on state welfare funds—insurance of indigents by assuming some costs the State would otherwise have to pay, and the denial of insurance to aliens for 5 years after their admission for permanent residence by discouraging the entry of those most likely to become welfare claimants. This discouragement in addition supplements immigration law standards requiring self-support, since it defines the extent of support of which the potential immigrant must be capable (cf. J.S. App. 39, n. 24). The difference in treatment of indigent citizens and recently entered aliens is independently justifiable because Congress could rationally conclude that there is a greater national moral obligation to citizen indigents than to recently-entered aliens, even those who enter with the subjective intent of eventually becoming citizens.

sive—since it prohibits enrollment of aliens like appellees who have not been admitted for permanent residence even if they have lived here for more than 5 years.[7]

[7] This under-inclusiveness is not substantial. Both the district court (J.S. App. 30) and appellees (App. Br. 44) assumed the rationality of excluding from enrollment long-term alien residents who either entered illegally or who entered for work or medical treatment reasons, while retaining their primary attachment to their native country, such as diplomats, foreign correspondents, and persons requiring specialized long-term medical care. Appellees apparently do contend that there is no rational basis for treating aliens paroled into this country differently than those admitted for permanent residence (App. Br. 39-43). But if they have not slept on their rights, appellees will be as eligible for enrollment after five years as aliens initially admitted for permanent residence (see note 4, *supra*).

But this Court reaffirmed in *Salfi* (slip op., at pp. 20-23) the longstanding principle [8] that the equal protection requirement is satisfied so long as the statutory classifications are reasonable, even though they may be imperfect, and thus in practice result in some inequities. The distinctions of which appellees complain do not transgress this constitutional principle; although perhaps imperfect, they are reasonable.

In sum, the provisions at issue are not designed to discriminate against aliens as aliens,[9] but instead are related to a legitimate legislative objective—the desire of Congress to limit the social insurance program contained in the Social Security Act to those with a demonstrable tie to the nation. Cf. *Geduldig* v. *Aiello*, 417 U.S. 484, 494-496. An alien may demonstrate that tie either by long-term residence or by sufficient work in covered employment for eligibility for Title II insurance. That is not an unreasonable requirement.

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[8] See, *e.g.*, *Flemming* v. *Nestor*, *supra*, 363 U.S. at 612; *McGowan* v. *Maryland*, 366 U.S. 420, 426; *Dandridge* v. *Williams*, *supra*, 397 U.S. at 484-485; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356.

[9] This lack of discriminatory intent is confirmed by the fact that Cuban refugees paroled into the United States, such as appellees, are eligible for medical assistance payments pursuant to the Medicaid program, Title XIX of the Social Security Act, on the same basis as citizens, without regard to whether they were lawfully admitted for permanent residence or the length of their residency. 42 U.S.C. (Supp. III) 1382c (a) (1) (B) (ii), 1396a(10).

CONCLUSION

For the foregoing reasons as well as the reasons set forth in our main brief, the judgment of the district court should be reversed.

Respectfully submitted.

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